Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
_____ TERM, 1992

JOHN W. MCGOWAN,
PETITIONER

VS.

MISSISSIPPI STATE OIL & GAS BOARD,
RESPONDENT

BRIEF OF RESPONDENT

JIM WARREN
ATTORNEY AT LAW
LEAD COUNSEL

TIM WAYCASTER
ATTORNEY AT LAW

WAYCASTER & WARREN
POST OFFICE BOX 23366
JACKSON, MS 39225-3366
(601) 355-3910
ATTORNEY FOR RESPONDENT

QUESTIONS PRESENTED

Respondent disagrees with Petitioner's statement of the questions presented to the extent that Petitioner claims that this case presents an important question of federal law which has not been, but should be, settled by this Court. The Petitioner admits that the "substantial evidence rule" is the well settled limit to judicial review of administrative agency action and that this Court has settled the question of whether an agency can both advocate a position and adjudicate a controversy involving that position. Withrow v. Larkin, 421 U.S. 35, 43 L.Ed. 712, 95 S.Ct. 1456 (1975). The Petitioner has admitted throughout the course of these proceedings that his real complaint is with each of those independent rulings. He now states that the question presented before this Court is that of whether application of the substantial evidence rule in the Withrow

fact situation violates due process. Petitioner raises no new legal or policy-based justification for considering cases where the substantial evidence rule and the Withrow fact situation occur together any differently than cases where they occur independently of one another.

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JOHN W. McGOWAN PETITIONER

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MISSISSIPPI STATE OIL
& GAS BOARD RESPONDENT

STATEMENT OF THE CASE

The Respondent agrees with most of the Petitioner's statement of the case but disagrees with the Petitioner's statement to the extent Petitioner engages in editorializing or in presenting matter which is outside the record. Statements such as those made by the Petitioner with regard to "packerless" technology allowing the Petitioner to purchase and operate hundreds of wells, providing a source of employment to hundreds of people and offering hope to a declining oil industry cannot be confirmed by the Respondent, and,

therefore, to that extent, the Respondent would disagree with the Petitioner's statement. Additionally, statements such as the Petitioner's comparison of his relationship with the Respondent to that of France and England during the "Thirty Years War" are typical of the Petitioner's tendency throughout these proceedings to overly dramatize his arguments. Petitioner was very selective in choosing examples of "skirmishes" between he and the Board as evidenced by the fact that from those about which he chose to write, one would get the impression that the Respondent set out to intentionally harm the Petitioner for no reason whatsoever. In fact, the Petitioner lost many of those skirmishes. The first state court to review the proceedings held that:

> This Court has reviewed the record and does not find facts and circumstances which indicate such unfairness as would rise to the level of a due process

> violation. On the contrary, it appears that the hearing was conducted in a fair and even-handed manner.

(Petitioner's Appendix at 57.)

The Mississippi Supreme Court agreed with that assessment. (Petitioner's Appendix at 36.) The more accurate characterization of the proceedings below would be that neither party was free of indiscretion during the seven or eight year history of their dealings with regard to packerless wells. The state court obviously agreed more with the latter characterization of the procedural issues raised by the Petitioner when it held that:

> In summary, the procedural issues raised by McGowan were, for the most part, not procedural violations at all and the rulings of the Board were either correct, well within the discretion of the Board or harmless.

(Petitioner's Appendix at 69.)

The Petitioner's lengthy recitation of the proceedings before the Board over the

past several years, is, for the most part, technically accurate, but, it contains erroneous assumptions with regard to the Board's motive for ruling as it did. None of those assumptions regarding motive are based on evidence in the record and are, therefore, inappropriate.

Finally, a further example of Petitioner's tendency to overstate or mischaracterize the facts in his Statement of the Case is his attempt to point to an excerpt from the Respondent's brief before the Mississippi Supreme Court wherein the Respondent stated "The Board reached their conclusion on the matter when they decided that they too should oppose packerless wells." (Petitioner's Petition at page 27; Petitioner's Appendix at 101.) In spite of the fact that that passage, although not perfectly clear on the point, referred to the Board's ruling on the Petitioner's case after hearing it, the Petitioner jumps to

the conclusion that the passage is an admission that the Board made its decision prior to the hearing and therefore prejudged the matter. Such a presumption is not supported by anything contained in the record nor could it be farther from the truth.

SUMMARY OF THE ARGUMENT

The Petitioner claims that this case presents an important question that has not been previously decided by this Court. The question is whether a combination of the substantial evidence rule, which sets the limits of judicial review of administrative agency actions, with the decision of this Court in Withrow v. Larkin, 421 U.S. 35, 43 L.Ed. 712, 95 S.Ct. 1456 (1975), which says an administrative agency can be both advocate of a position and adjudicator of a controversy involving that position, amounts to a violation of due process. The Petitioner admits that the question of whether either of these important mechanisms of administrative law are *per se* violations of due process when they occur independently has been decided. The Respondent argues that Petitioner raises no reason for considering these mechanisms differently when they occur together other

than the general distrust he has for someone who is his adversary. That reason has already been dismissed as inadequate by this Court and, therefore, no new question is presented by the Petition.

ARGUMENT

The Petitioner admits that the substantial evidence rule and the Withrow decision are the current state of the law applicable to this case. He argues, however, that when the two are combined, a new situation occurs that has not been addressed by this Court. The Respondent disagrees with that argument and contends no new issues are raised by the combination of the substantial evidence rule and the Withrow facts.

I. THE SUBSTANTIAL EVIDENCE RULE

Throughout these proceedings, the Petitioner has conceded that the substantial evidence rule is the proper standard of judicial review of administrative agency actions. He does so reluctantly because of his strong distaste for the substantial evidence rule and because of his belief that appellate courts should conduct an independent review of the

weighing of the evidence presented before an administrative agency. His admission of the substantial evidence rule as the proper standard, however, is necessitated by the great weight of authority establishing the rule and outlining the legal and policy justifications for its existence. Many of those authorities are cited by the Petitioner in his argument in support of his petition. (Cobb Brothers Construction Company v. Gulf, M & O R. Company, 213 Miss. 706, 57 So. 2d 570 (1952); Barnwell, Inc. v. Sun Oil Company, 249 Miss. 398, 162 So. 2d 635, 640 (1964); County Board of Education v. Parents and Custodians of Students, 251 Miss. 195, 168 So. 2d 814, 819 (1964); Mississippi Public Service Commission v. Columbus and Greenville Ry. Company, 573 So. 2d 1343, 1346 (Miss. 1990))

The Petitioner makes clear that his disdain for the substantial evidence rule

is based on the fact that the rule necessarily presumes that the agency weighs evidence put before it. In his opinion, it is not safe to make that presumption. This is especially troubling to him when, in his opinion, the only justification for the existence of the rule is reduction of judicial case load.

A. The Presumption of Honesty and Integrity

The Petitioner's argument that it is not safe to presume that an administrative agency will weigh evidence put before it has been addressed by this Court. In Withrow, this Court found a presumption of honesty and integrity in those serving as adjudicators and, as recognized by the lower State Court, the Withrow Court "recited a litany of situations in which no due process violation has been found including instances where commission members had made public statements or given

congressional testimony concerning facts involved in the matter to be adjudicated." (Petitioner's Appendix at 56.) Apparently, this Court has already decided that the policy considerations supporting the existence of our administrative law system and its procedural mechanisms - including the substantial evidence rule - outweigh the fact that some petitioners before administrative agencies are unable to presume honesty and integrity in their adversaries. The Withrow decision forced such petitioners to presume honesty and integrity and required a petitioner to show special facts and circumstances showing that the risk of unfairness is intolerably high in order to overcome that presumption. As the state reviewing courts explicitly determined, those special facts and circumstances do not exist in this case.

B. The Justifications for the Substantial Evidence Rule

There is clearly greater justification for the existence of the substantial evidence rule than that of reduction of judicial case load. This is true although the fact that revocation of the rule - even to what Petitioner advocates as a limited extent - would result in this Country's judicial system being completely overwhelmed. The substantial evidence rule recognizes an administrative agency's familiarity with its own enabling legislation, rules and regulations. It further recognizes that those statutes, rules and regulations often involve technical matters which, in order to be administered, require of their administrators a greater degree of exposure or expertise than the average person possesses. In Mainstream Savings & Loan Association v. Washington Federal Savings

& Loan Association, 325 So. 2d 902 (Miss. 1976), the Mississippi Supreme Court recognized the expertise of administrative agencies in their particular field and has afforded each "a reasonable latitude in the exercise of sound judgment in the performance of its specialized function." Delegation of such "specialized functions" to administrative bodies made up of those best able to deal with them is one of the basic principles of administrative law. In its opinion below, the Mississippi Supreme Court held that:

> The existence within government of discreet areas of quasi-legislative, quasi-executive, quasi-judicial regulatory activity in need of expertise is the *raison d'etre* of the administrative agency. Because of their expertise and the faith we vest in it, we limit our scope of judicial review.

(Petitioner's Appendix at 43.)

Clearly, there are other justifications for the substantial evidence

rule than the equally important consideration of judicial case loads.

II. THE WITHROW DECISION

The Petitioner also concedes that this Court has already decided that it is not a *per se* violation of due process for an administrative agency to adjudicate a controversy in which it has advocated a position. Again, he finds that ruling distasteful because he refuses to believe that an adversary can be fair to its opponent. The various justifications for this Court's ruling in Withrow are set forth in the ruling itself. Again, this Court has apparently reached the conclusion that those important justifications outweigh the fact that some petitioners are unable to place trust in the administrative agency's ability to be fair under such circumstances. The Withrow Court based its ruling that the combination of the adjudicatory and adversarial roles were not

violative of due process on the presumption of fairness and integrity in those acting as adjudicators.

Clearly, this Court has ruled that it will not presume a lack of honesty or integrity in administrative agencies acting as both advocates and adjudicators.

III. COMBINATION OF THE SUBSTANTIAL EVIDENCE RULE AND THE Withrow DECISION

After conceding that the substantial evidence rule and Withrow are the state of the law, the Petitioner's effort to create ". . . an important question of federal law which has not been, but should be, settled by this Court . . .," as required by Rule 10.1(c) of the Rules of this Court, is to argue that when the substantial evidence rule is applied in the same case where the Withrow facts exist, there is suddenly a due process violation where there was not one before. The difference, he claims, is the lack of a safety net in the form of

judicial review of the evidence presented before the administrative body. However, in order to reach the assumption that if the courts do not review the evidence there will be no review of the evidence, it must be presumed that the administrative agency will not conduct such a review. In order to reach that conclusion, it is necessary to make the same presumptions of unfairness and lack of integrity that result in Petitioner's disdain for the substantial evidence rule and the Withrow decision. As already argued, however, this Court has made the opposite presumption - one of fairness and integrity. Therefore, the Petitioner's argument that the substantial evidence rule and the Withrow facts should not be combined is based on the same presumption of dishonesty which is expressly contrary to the presumptions at the heart of the substantial evidence rule and Withrow.

Further, throughout his argument, Petitioner implies that combination of the substantial evidence rule with the Withrow situation amounts to the "special facts and circumstances" which would justify an exception to Withrow. To the contrary, the structure of the administrative law system is such that a combination of those situations is probably more common than the lack of combination of those circumstances. Therefore, to eliminate the substantial evidence rule and grant a *de novo* review of the evidence at the appellate court level whenever the Withrow facts occur, would amount, for the most part, to an abandonment of the substantial evidence rule and would result in the routine occurrence of the inefficiencies and judicial overload that the rule was designed to prevent.

In summary, the Petitioner can point to nothing which is yet to be ruled on by

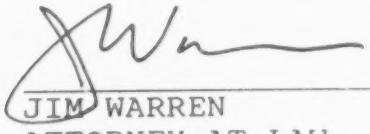
this Court to support his contention that the substantial rule and the Withrow facts should not be combined. Therefore, since nothing new is presented, review should not be granted.

CONCLUSION

The Petitioner does not approve of the substantial evidence rule but admits that it is the proper standard of judicial review of an administrative agency action. The Petitioner likewise does not approve of this Court's decision in Withrow but admits that it does represent the state of the law with regard to an administrative agency serving as an adversary and adjudicator in the same controversy. Therefore, those two situations taken independently have been expressly ruled upon and should not be the subject of further review. However, the Petitioner claims that when those two situations occur simultaneously, the resulting situation is somehow different.

His only explanation of that difference, however, when analyzed, is based on the same arguments rejected by this Court with regard to those situations occurring independently. As he can argue no new or additional justification for his position, review is not proper and therefore, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,



JIM WARREN
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ATTORNEY AT LAW

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